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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION

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The briefs of respondents Weyerhaeuser Company ("Weyerhaeuser") and New York Navigation Company, Inc. ("New York Navigation") are inaccurate in several important factual assertions, in violation of Supreme Court Rules 24 and 40. There is a reason why these briefs contain no references to the record.

The Courts below found as facts:

1. The vessel was unseaworthy at the beginning of the voyage (A-18)* because of a clapper valve which corroded

* These references are to the appendix in the petition.

over a long time (A-6, A-10). The valve was frozen in an open position because the lugs were completely corroded (A-6).

2. Long before the instant voyage, the Master knew of abnormal bilge readings in #3 hold (A-8).

3. The Master reported the problem to his marine superintendent in Portland (A-10) long before the instant voyage.

4. The marine superintendent read the log books after each voyage (A-10), and knew of the leak in that way.

5. The shoreside officers of Weyerhaeuser knew there was an unusual problem (A-11) of excessive water entry in #3 hold (A-18), and that it wasn't a feedback of fresh water (App. 121)*, or a leaking ship's plate (App. 120).

6. The bilge readings were abnormally high in #3 hold in Baltimore before petitioner's cargo was loaded (A-7).

7. The ship was clearly unseaworthy in Cristobal because of the corroded clapper valve in #3 hold on the port side. (A-7, A-10, A-17).

8. The readings were very high in #3 hold when the ship was loaded and the valve was under the sea. (A-5, A-10).

9. The Master's explanations concerning the conditions at Cristobal were implausible. (A-10).

10. Petitioner's cargo in #2 hold was not yet damaged at Cristobal. (A-6, A-10).

These findings of the Courts below are *all supported by the record*, whereas the allegations in the responsive briefs are unsupported.

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* Exhibit volume.

Weyerhaeuser at page 9 and New York Navigation at page 3 refer to an inspection of the ship at Baltimore by a Captain Rikkers. This person was in the Courtroom during the trial but was not made a witness, either live or by deposition. Nor was his alleged survey report placed in evidence.

On pages 8 and 11, Weyerhaeuser states that no vessel personnel reported any leakage problem in #3 hold to the supervisory staff. The record is otherwise and the Courts below have so found. (A-10).

Clearly erroneous, and contradictory are the following findings of the Courts below:

1. That petitioner failed to prove Weyerhaeuser knew, or must have known the ship was unseaworthy. The findings set forth above contradict this finding.

This Court has held that "a ship that leaks is unseaworthy; *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 213, 83 S. Ct. 1185, 1190, 10 L. Ed. 2d 297, 303 (1963).

THE COURTS BELOW HAVE FOUND THAT WEYERHAEUSER KNEW THE SHIP WAS UNSEAWORTHY BECAUSE THEY FOUND IT KNEW SHE LEAKED; THEY HAVE ALSO HELD WEYERHAEUSER DIDN'T KNOW SHE WAS UNSEAWORTHY. THESE FINDINGS ARE INCOMPATIBLE AND THE DECISION BELOW RESTS UPON CLEAR ERROR.

Everybody knew the ship had lost its watertight integrity except shipper, Iligan. To hold cargo owners had to show Weyerhaeuser knew the valve was the cause of the leak is an impossible burden where the shipowner refuses to be bothered.

The shoreside officers knew it wasn't a feedback of fresh water (App. 121), or a hole in a ship's plate (App. 120). The only other possible cause was the valve, an endemic problem in old Liberty ships and this one was 22 years old at the time. (A-4).

2. That there were routine annual inspections of the ship, with hamer testing of the valves. Because Weyerhaeuser did not produce a surveyor to identify the alleged certificates and testify about these alleged inspections, Judge McLean refused to allow them in evidence (Lower Court App. 623a, 345a, 346a). Judge Ward knew this (A-9). *They are not in the record as evidence.*

3. That petitioner did not prove Weyerhaeuser "must have" known the valve was holed. Judge Ward found that Weyerhaeuser knew that #3 hold leaked (A-10, A-11, A-18), and that an inspection would have revealed the specific cause (the deteriorated valve) (A-10), and the owner was on notice of the problem (A-10). In view of these findings, Judge Ward's conclusion is clearly erroneous. The record is clear that Weyerhaeuser "should have known" the valve was the cause. This is the foundation for the question left open by this Court in *The Malcolm Baxter, Jr.* (Petition pp. 9-10) and decided against the shipowner in *Monarch SS Co. Ltd.* v. *Karlshamus Oljefabriker (A/B).* (Petition, p. 10).

The Circuit Court's holding that even wilful conduct, or gross negligence in supplying a known unseaworthy ship will not void the contract is not dictum. It recognized the weaknesses in the District Court's opinion, and therefore, made a far reaching determination that it intends should control all future similar cases. (C-5, C-8).

The decision of the Court of Appeals is abhorrent to common sense, and a far cry from the public policy of this

country that only seaworthy ships should be sent to sea. *The Caledonia*, 157 U.S. 124, 133, 15 S. Ct. 537, 541, 39 L. Ed. 644, 647 (1894).

The requirement originally was absolute. Upon the objection of shipowners that the burden was too onerous, the warranty was reduced by statutes to a duty to exercise due diligence, i.e., a shipowner was not to be liable for *latent defects* not discoverable before the voyage.

However, as these inroads developed, the Courts remained alert to the *essential requirement* that a ship should be seaworthy. Judge Learned Hand in *Metropolitan Coal Co.* v. *Howard*, (2 Cir. 1946) 155 F. 2d 780, 783-784, stated the public policy as follows:

> "the warranty of seaworthiness is a favorite of the admiralty and exemptions to it or limitations upon it, are narrowly construed."

Judge Ward found that the ship was leaking in Baltimore (A-18), and clearly leaking seawater at Cristobal (A-7, A-10, A-17). The Circuit Court did not mention Weyerhaeuser's conduct at Cristobal at all, despite the long-standing doctrine that the presence in a ship of seawater raises a presumption that the ship is unseaworthy. *Wessels* v. *The Asturias* (2 Cir., 1942) 126 F. 2d 999, 1001 following The Folmina, 212 U.S. 354, 29 S. Ct. 363, 53 L. Ed. 546 (1909).

The survey of the American Bureau of Shipping at Moji (Weyerhaeuser's Ex. P) shows the valve was leaking from the bonnet cover, plug, valve flange and valve body, and a 2" hole had been welded (Plaintiff's Exhibit 36; App. 61 photo).

Yet New York Navigation states at page 5 that after the incident "the outside of the valve looked all right." With a large weld, it did not look "all right".

Weyerhaeuser refers to the recent edition of Gilmore and Black, The Law of Admiralty (2nd Ed. 1975) Sec. 3-42 discussing the question of the extension of the deviation doctrine. In the same treatise at Sec. 3-41, page 180, in considering the possible effect of the provisions of the Carriage of Goods by Sea Act on the application of the deviation doctrine, the authors are careful to circumscribe their observations by reminding the reader that COGSA was not intended as a complete code of law with respect to the carriage of goods by sea, but only a set of compulsory terms to be read into bills of lading. (ibid, page 172). Thus, the provisions of COGSA may not be used to provide relief which was not previously available to a carrier because of its breach of an essential part of the contract. The authors contend that the deviation doctrine should not apply unless there is a causal connection between the damages and the deviation. It is noted by the writers that their thesis is not affected by the holding in *Jones* v. *The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953) since there was such a causal connection. In the instant case also there is no question of causal connection.

In no Circuit does the "clearly erroneous" doctrine of Federal Rule of Civil Procedure 52(a) apply where the lower Court saw no live witness. The Circuit Court has, as stated by Judge Medina in *Deep Sea Tankers* v. *The Long Beach* (2 Cir. 1958) 258 F. 2d 757, 759-760, "an eventual responsibility for the facts as well as the law."

It is basic that determinations of negligence, or lack of negligence are conclusions of law that are not covered by Federal Rule of Civil Procedure 52(a) *Mamiye Bros.* v. *Barber Steamship Lines, Inc.* (2 Cir., 1966) 360 F. 2d 774, 776; *Director General of India Supply Mission* v. *SS MARU* (2 Cir., 1972) 459 F. 2d 1370, 1373 (footnote).

It is clear that the Second Circuit did not study this record, for the record is replete with proof that Weyerhaeuser knew hold #3 was leaking before petitioner's cargo was stowed therein.

New York Navigation agrees that COGSA applies only to carriers and Iligan agrees it can be contractually incorporated by non-carriers.

In this case, a non-carrier, New York Navigation did not incorporate the COGSA or Clause 17 of the bill of lading, which refers only to the carrier. To hold that it did is error.

Should the Court of Appeals' decision be allowed to stand the public policy requiring seaworthy ships will have been perverted because shipowners will have virtual immunity in sending to sea known unseaworthy vessels.

The permissive decision below invites disaster. It should be promptly reversed.

CONCLUSION

Petitioners respectfully request this Honorable Court to accept the petition.

Respectfully submitted,

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